

Robert M. Garcia was working on a bay window roof on April 20, 2004, when he slipped and fell landing on a concrete patio. Garcia filed a claim for workers compensation benefits and argued that he was respondent's employee at the time of the accidental injury. Respondent denied the claim and argued Garcia was an independent contractor. The Administrative Law Judge (ALJ) found Garcia failed to sustain his burden of proof that he was respondent's employee on the date of accident. Consequently, the claim for compensation was denied.

Garcia requests review and argues that he was respondent's employee. And if the Board agrees, Garcia further requests the case be remanded back to the ALJ to determine the remaining issues. Respondent argues that Garcia was an independent contractor and the ALJ's Award should be affirmed.

The sole issue for Board determination is whether Garcia was respondent's employee at the time of the accident.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Robert Garcia, a certified journeyman carpenter, owned and operated Custom Construction Company. Initially his company did the framing of new houses. Garcia had four to six employees between 1998 and 2003. And he was a general contractor for the building of a new house for Ms. Loretta Mancuso from December 2004 through July 2005. Garcia testified that he had workers' compensation insurance from 1986 through 1991. As the housing market declined Garcia no longer had employees and was self employed. Garcia continued to bid jobs as Custom Construction Company seeking and performing work for other contractors.

Barney Ashner, respondent's part owner, testified that respondent's business primarily develops and builds single family homes. Ashner testified that subcontractors were hired to do the work. Dennis Hansey, an independent contractor, acted as project superintendent and oversaw the projects until completion. Ashner testified respondent's employees were limited to one or two secretaries beside himself and his partner. Daniel Waldberg, respondent's other part owner, testified that respondent used subcontractors to perform all of the physical labor. These subcontractors were independent contractors. Waldberg testified:

Q. And when you say that, what do you mean by that?

A. They were their own business entity. We had no contractual employment relations with them. They were just on a case-by-case basis.

Q. Did you contract out carpentry, plumbing, sheetrock-type work, all the work involved in building a home?

A. Yes.

Q. Did you require your independent contractors to carry workers' compensation insurance?

A. Yes.<sup>1</sup>

Waldberg also testified that Garcia had his own tools, would bring his own materials, perform the work, clean up afterwards and then leave the job site. Garcia worked based on his schedule. Waldberg further testified that Garcia was free to work for other employers or contractors at the same time he was performing work for respondent.

When Garcia first started working for respondent he agreed that he was an independent contractor. Garcia testified that his job was to do a "punchlist" after the home had been completed which involved doing any necessary repairs or adjustments to the original work. He further testified that he also built some decks onto some of the new houses that were being built.

In October 2003 while Garcia was building a deck, he suffered a torn ACL on his right knee. He was performing contract work for respondent at the time. The medical treatment was paid for by Garcia's personal insurance. He was off work for approximately 6-8 weeks. When Garcia returned to work he continued to bid on jobs and do work for respondent and others. But Garcia claimed that he sought to change his status to an employee for respondent. Garcia testified:

Q. And upon returning to work or performing work for Barney Ashner Homes, did you talk to anyone, in particular, Mr. Ashner, about changing your relationship with that company?

A. Yes. On several occasions, I visited with Barney and his partner, Dan, about going to work for them as an employee and going on a salary.

Q. Why did you want to go to work as an employee?

A. Well, in October, when I hurt my knee, I was -- my medical took care of my knee, but I didn't have -- for the last six weeks, eight weeks I was off, I was just out of work, you know, and didn't have any kind of income and I wanted to go to work for them by the hour. They had enough work with all the work I was doing for them that if I worked for them as an employee, I would have medical coverage and benefits.<sup>2</sup>

Claimant further testified:

Q. Now, when you started back in March of '04 working for Barney Ashner Homes, were you still working as an independent contractor?

---

<sup>1</sup> Waldberg Depo. at 4-5.

<sup>2</sup> R.H. Trans. at 8-9.

A. I was at that time, and we were in the process of negotiating a salary or an hourly wage as an employee.

Q. Now, there's bid sheets here from 3/21/04, 3/25/04, 3/23/04, 3/26/04, 3/29/04, 3/31/04, and they all -- all of those, would you say, was work as an independent contractor?

A. Yes.

Q. And even though you were still doing work for him as an independent contractor, were you continuing to speak to him about becoming an employee?

A. Right. We'd had three meetings at that point.

Q. And after this job on 3/31/04 was completed, did you reach an agreement with Mr. Ashner about becoming an employee?

A. Yes. I met with Dan and Barney at a Mexican restaurant and he had a handful of those bills and he was complaining about the prices. I said, "Well, you can save yourself some money and I'd have a little more security if I just worked for you by the hour and we wouldn't have any more problems with discussions about money." You know, we were talking about some kind of terms, so I knocked it down probably two or \$300 at that time off the prices of that and he said the he would go with \$25 an hour and insurance and take it from there.<sup>3</sup>

Conversely, Waldberg testified that Garcia was an independent contractor and he never became an employee. Waldberg testified:

Q. At any point in time in 2003 and 2004 while he was performing work for Barney Ashner Homes, did his employment relationship change between independent contractor to employee, or did you have any conversations about a change in the employment relationship?

A. No. He -- his employment -- well, he wasn't employed, but his work as a subcontractor had always -- he had always been working as a subcontractor. He recalls a meeting, a luncheon meeting that he claims we had. I can't remember that meeting, but if Robert wanted to meet, we most certainly would have offered him the courtesy of a meeting, but from that meeting, we never considered changing his status as far as what he did for us. He was always a subcontractor.<sup>4</sup>

---

<sup>3</sup> R.H. Trans. at 10-11.

<sup>4</sup> Waldberg Depo. at 6-7.

Waldberg further noted that he and Ashner had discussed the possibility of hiring a handyman but had concluded it was more economical to hire an outside contractor than to have someone permanently on the payroll.

Garcia testified that the April 8, 2004 bid sheet for the work at the house where he was injured, was based upon a \$25 hourly rate of pay. Ashner agreed the bid sheet was based upon an hourly rate as he assumed that was how Garcia arrived at his total but it was a fixed bid proposal to do the work. And that was what Garcia was paid upon completion of the work whether it took fewer or more hours than estimated. Moreover, Garcia received a lump sum payment for each of the jobs that he completed. These payments did not have any taxes or insurance withheld from the checks. While Garcia was working for respondent, he was able to do other jobs as well.

Garcia's April 8, 2004 bid was accepted by respondent and on April 20, 2004, Garcia was performing the contracted work on a bay window roof when he slipped and fell approximately 25 to 30 feet landing on a concrete patio. He suffered numerous lacerations, a compressed vertebrae and lost 11 teeth. Garcia was treated at Truman Medical Center and at St. Luke's Hospital. The dental work was done by UMKC.

Medicaid paid some of the medical bills and some remain unpaid. Garcia was off work from April 20, 2004 through September 9, 2004. He was released to return to work on September 10, 2004. Garcia worked approximately three months for Lowe's starting in September 2004. As previously noted, he performed work as a general contractor from December 2004 through July 2005. Then in 2008 Garcia worked approximately three months for Classic Guttering. He testified that he also did some small contracting jobs where he would oversee the work but did not perform any physical labor.

Initially, Garcia points to the fact that respondent's project manager had the right to control the manner that the work was performed. Garcia testified:

Q. Now, when you were on this job where you got hurt, was there anyone there to supervise you?

A. Not on the job the entire time. They have a superintendent that would coordinate everything, Denny Glenn (ph), I believe.

Q. Was he there when you began work on this particular job?

A. Yes.

Q. And did he give you any instructions on how to perform the job?

A. He told me he thought what was wrong with the windows and why they were leaking and how he would go about fixing them and what probably would be the best way to fix them.

Q. So, did you feel compelled to follow his suggestions on how to do the work?

A. Yes. He was right.

Q. Even if he was wrong, did you feel that you had an obligation to follow his instructions on how to perform the work?

A. Yes.<sup>5</sup>

Conversely, Waldberg indicated that the superintendent merely coordinated the coming and going of the various subcontractors at the job sites. Waldberg testified:

Q. Did you ever tell Mr. Garcia how to perform the carpentry work that he performed?

A. No, I wouldn't have a clue.

Q. And he mentioned that there was a supervisor that periodically checked on jobs; is that true?

A. Yes.

Q. Is the supervisor someone who would have told Mr. Garcia how to perform his carpentry work?

A. No.

Q. Was Mr. Garcia free to use his own judgment in terms of how to perform the carpentry work that he performed for your company?

A. Yes.

Q. And he did provide his own tools and transportation?

A. Yes.<sup>6</sup>

Waldberg further noted that the superintendent's primary function was a job scheduler and would attempt to get subcontractors to show up when they had indicated they would be at the job sites. And Waldberg questioned whether the superintendent would even have been at the house where Garcia was injured as the work was on an occupied home and it would have been up to Garcia to schedule an appropriate time with the homeowner to do the job.

---

<sup>5</sup> R.H. Trans. at 14.

<sup>6</sup> Waldberg Depo. at 11-12.

It is significant to note that after the accidental injury when Garcia applied for the job with Lowe's he did not list respondent as an employer. And during Garcia's testimony he initially offered a false explanation for the termination of his job at Lowe's. But the documents from Lowe's listing the reasons for his termination indicate he was terminated for purchasing items with his employee discount and then returning them for full price and for failing to purchase items taken from stock.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.<sup>7</sup> There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>8</sup> The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>9</sup>

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.<sup>10</sup>

Nevertheless, the right of control test has not proved satisfactory as an exclusive determinant of the employment relationship. Other factors which Kansas courts have used in various ways to determine the employment relationship include the following:

1. The existence of a contract to perform a certain piece of work at a fixed price.
2. The independent nature of the worker's business or distinct calling.
3. The employment of assistants and the right to supervise their activities.
4. The worker's obligation to furnish tools, supplies and materials.

---

<sup>7</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>8</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>9</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>10</sup> *Wallis* at 102-103.

5. The worker's right to control the progress of the work.
6. The length of time that the worker is employed.
7. Whether the worker is paid by time or by job.
8. Whether the work is part of the regular business of the employer.<sup>11</sup>

Based upon the following facts, among others, the Board concludes that, for purposes of the Workers Compensation Act, at the time of the accident Garcia was an independent contractor: (1) Garcia agreed he was an independent contractor that bid for jobs with respondent until the job he was injured on. And even though Garcia claimed the work relationship had changed, nonetheless, he bid on the job just as he had always done. (2) Garcia's argument that the superintendent directed how he was to perform the work is refuted by Waldberg's more persuasive testimony (the Board agrees with the ALJ's determination that Garcia's credibility was suspect) as well as the fact that Garcia bid on the jobs based on the work that he determined was necessary. And the bids were presented to respondent before any alleged meeting with the superintendent at the job site. (3) Garcia had the freedom to choose which odd jobs he would bid on and perform. And he had the freedom to work for other employers. (4) Garcia determined his work schedule and the number of hours that he worked. (5) Garcia's billings were based upon the odd jobs or tasks that he performed and what he believed his work was worth. (6) The working relationship between Garcia and respondent was of short duration. (7) Garcia provided his own tools, transportation and generally provided the materials necessary to perform the work.<sup>12</sup> (8) Respondent did not control or supervise Garcia's work. Garcia determined how to perform the work, how long it would take to perform the work and the materials required to perform the work. (9) Garcia did not have established work hours nor was he required to work full-time. (10) Garcia was not required to personally provide the services as he had the ability to hire, supervise and pay his own assistants. (11) The parties intended that Garcia would be treated as an independent contractor as evidenced by the fact that respondent did not withhold taxes from Garcia's checks. And Garcia received a lump sum payment based upon his bid for the work irrespective of how long it took to perform the job. (12) After the accident Garcia did not list respondent as an employer when he applied for a job with Lowe's and instead listed Custom Construction Company as his employer.

In summation, after weighing and carefully considering all the facts, the Board concludes that the evidence fails to establish that it is more probably true than not claimant

---

<sup>11</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>12</sup> The Board is mindful that respondent would occasionally use its volume discount to provide lumber on some projects where Garcia built decks.



was an employee of respondent at the time of the accident. Accordingly, this accident is not compensable under the Workers Compensation Act.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>13</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated February 16, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2011.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

---

<sup>13</sup> K.S.A. 2010 Supp. 44-555c(k).